## BRIEF.

### OFFICIAL AND PRINTED REPORTS OF CASE IN STATE COURTS.

Rea v. Fornan, et al. 46 N. E. (2), 649; decision by Court of Appeals.

Rea v. Fornan, et al. 46 N. E. (2), 664; decision on motion for rehearing.

Rea v. Fornan, et al. 46 N. E. (2), 667; decision on motion to certify record and vacate judgment.

Rea v. Fornan, et al., 140 O. S., 546; decision on motion to dismiss petition on appeal.

Note: Official report shows that among other issues petitioner asserted failure of state courts to give full faith and credit to public acts and records of another state—Section 1, Article 4, U. S. Constitution, Section 6, Article 4, Ohio Constitution—due process and equal protection, Fourteenth Amendment, U. S. Constitution.

Rea v. Fornan, et al., 141 O. S., 476; decision on rehearing of motion to dismiss petition on appeal.

Note: Official report shows that among other issues petitioner asserted failure of state courts to give full faith and credit to public acts and records of another state—Section 1, Article 4, U. S. Constitution, Section 6, Article 4, Ohio Constitution—due process and equal protection, Fourteenth Amendment, U. S. Constitution.

## CONSTITUTIONAL QUESTIONS INVOLVED.

**Ground for Jurisdiction.**

The grounds under which jurisdiction of this court is invoked are as follows:

That the Supreme Court of the state of Ohio deprived your petitioners of their property without due process of law and without compensation and the equal protection of the law guaranteed to petitioners by the Fourteenth Amendment of the Constitution of the United States when it sustained a motion to dismiss, and refused to hear on its merits, as required by the Ohio Constitution, their petition of appeal filed as of right based upon their asserted complaint:

(a) That the Court of Appeals of Franklin county, Ohio, in violation of Article IV, Section 1 of the Constitution of the United States failed and refused to give full faith and credit to the public acts and records of the state of Arizona, by reason of which your petitioners were deprived of their property.

(b) A judgment **at law, in ejectment,** for the recovery and possession and the legal title to specific real property was rendered by the Court of Common Pleas in favor of your petitioners against respondents. It was then appealed as a case **in chancery** to the Court of Appeals. The Court of Appeals of Franklin county, Ohio, was without jurisdiction, on the record, to hear, try, and adjudge an action **at law, in ejectment,** on appeal **de novo** as a case **in chancery,** when the Constitution of Ohio provides that the court has jurisdiction on appeal to try de novo, only, cases in chancery.

(c) That the Court of Appeals of Franklin county, Ohio, failed and refused to answer interrogatories propounded by your petitioners, predicated upon its written opinion, as required by the laws of Ohio, so as to make a finding of fact and conclusions of law upon which a valid judgment might be rendered.

(d) That the Court of Appeals of Franklin county, Ohio, refused to permit your petitioners to attack collaterally a void judgment and decree of divorce rendered without jurisdiction by the insolvency court, a court of limited jurisdiction, of Cleveland, Ohio, by reason of which your petitioners were deprived of their property.

The jurisdiction of this court is invoked for the foregoing reasons under the provisions of Section 237(b) of the Judicial Code of the United States, as amended, U. S. C., title 28, section 344(b) (8 F. C. A., title 28, para. 344(b), and rules of practice and procedure.

The jurisdiction of this court on the record, under the petition to grant this writ is established under the following:—

**Tumey v. Ohio**, 273 U. S., 510, 515;
**Matthews v. Huwe**, 269 U. S., 262;
**Van Huffell v. Harkelrode**, 284 U. S., 225, 230;
**Titus v. Wallick**, 305 U. S., 585, 306 U. S., 282.

## STATEMENT OF THE CASE.

The facts are stated at page 2 of the petition.

We wish to here emphasize that with reference to the claim of Mrs. Grace Backenstoe that she was married by license and ceremony at Flagstaff, Arizona, that only three witnesses were offered other than herself, to-wit: Homer Byers (R., page 346), Louis Novarro (R., page

156), and Mary Lewis (R., pages 25 and 109), clerk of the court at Flagstaff. Neither Byers nor Novarro testified as to witnessing any marriage or as to any duly authenticated document, but only as to what Grace or Pat told them or showed them confidentially, or as to what some third party told them. All others relate to confidential declarations of Mrs. Backenstoe and M. P. Murnan and the holding of themselves out as husband and wife after 1919 or as to the occupation and business of Mrs. Backenstoe and her illicit relationship with Mr. Murnan.

**Full Faith and Credit.**

Article IV, Section 1, of the Constitution of the United States, directs that "full faith and credit shall be given in each state to the public acts and records and judicial proceedings of every other state."

We respectfully submit that the Court of Appeals of Franklin county, and the Supreme Court of Ohio, failed and refused to give full faith and credit to the public acts and records of the state of Arizona, which are involved in this proceeding, to wit:

Section 3836 and 3844 of the Laws of Arizona, in force and effect in 1915, which are set out at page 10 in the petition.

The failure and refusal of the Ohio courts to give such full faith and credit to said laws resulted in the taking of your petitioner' property without due process of law.

It is fundamental, and this Honorable Court has often declared, that when a statute of a state prescribed, defines or limits the things that are essential to create a binding contract made in that state, that it is essential,

that in any court, in any state, wherein the contract required by such statute is sought to be enforced, that the essential requisites of the statute must be found to exist in order to constitute a binding contract. Further the requirements of the statute must be sustained by evidence rather than mere surmise, conjecture, suspicion or experiments of the trial judge. Full faith and credit must be given to such public act and its essential requirements. And if the Federal right thus asserted is intermingled with a finding of fact and conclusion of law as to make it necessary that the court analyze and examine the facts in order to determine whether a Federal right has been denied, that this court has and will take jurisdiction of such a case.

**U. S. v. Cargo**, 11 Fed. (2), 805, Cert. denied, 273 U. S., 696.

**Bradford Electric v. Clapper**, 286 U. S., 145, 154-161.

**John Hancock Mutual Life Ins. Co. v. Yates**, 299 U. S., 178, 181-183.

**Aetna Life Ins. Co. v. Duncan**, 266 U. S., 389, 393-394.

In the case at bar in order to sustain a valid contract of marriage it must appear that the requirements of the statute of Arizona were complied with. That the statutes of Arizona were never complied with is shown by the testimony of the clerk of the Superior Court of Flagstaff, Arizona, record, pages 25, 109.

In an attempt to justify the evasion and bypassing of the requirements of the Arizona statutes providing for the issuance and recording of a marriage license before any marriage shall be valid in the state of Arizona by the Ohio courts, it is contended that Grace Backenstoe

testified that she was married at Flagstaff, Arizona **(though she never saw or had a license or any marriage paper)**; that one Homer Byers saw at the clerk's office a marriage contract and bond **(none such were ever recognized by the state of Arizona)**; that one Louis Novaro **saw a marriage certificate that looked like his** and had a seal of Arizona on it **(shown him by Grace Backenstoe who testified while alive, that she never had any papers).**

None of this is competent evidence on which to base a finding that the clerk of the court **may have or might have** failed to record the issuance of a marriage license and does not, in the least, comply with the well established rule that:

> "Thus, if a paper purporting to be a certified copy of an official marriage register is offered **it must first** be asked why the original is not produced; this objection being satisfied, **the question then** arises whether the register is receivable under the hearsay exception as testimony to the facts recorded in it, **and, again,** whether under the same exception a certified copy is receivable to show the register's contents; **finally, the genuineness of the certified copy must somehow be indicated.**"
>
> **Greenleaf on Evidence,** 16th Ed., Vol. 1, page 627.

There is no evidence whatever, competent, relevant, or otherwise, of the execution or existence of any original document, or of any authenticated document, or of any autheticated copy of any document, specifically required by the statute of Arizona to constitute a valid and binding contract. The mere statement that someone said he saw something, like something, proves nothing.

**Richmond v. Patterson,** 3 Oh. 368;
**Stanglerin v. State,** 170 S., 453;
**Niles v. Sprague,** 13 Iowa, 202;

**Dairn v. Vacuum Oil Co.**, 113 S. (La.), 751;
**In Re Dirinza**, 118 N. E., 942 (Mass.);
**Gilmore v. Fitzgerald**, 260 S., 175;
**Blackburn v. Crawford**, 3 Wallace (U. S.), 175;
**Barnum v. Barnum**, 42 Md., 298 (on Arizona law);
**Mossman v. Mossman**, 4 Ind., 648.

Congress has provided the manner in which under the full faith and credit provision of the constitution "in which such acts, records and proceedings **shall be proved** and the effect thereof."

**Williams v. North Carolina**, — U. S., —, 87 L. E., 189, 192.

The Court of Common Pleas found that such statute was not complied with, that such contract did not exist. Judgment to that effect was entered in law. The Court of Appeals never made any finding that such statute was complied with in any essential particular, or that such contract existed. **Judge Barnes individually made a conclusion**, but even he made no finding of the essential facts required by statute to make a valid contract.

Not only in the purported finding of fact does Judge Barnes **speculate** as to why the marriage records of Arizona fail to show any marriage license ever to have been issued to Grace Backenstoe or Grace Daugherty and Pat Murnan by saying that **that failure may be accounted for by various possibilities** but **in his own opinion, the other judges each rendering a separate opinion**, he says:

> "Of course the presumption is very strong that the proper officer of the state of Arizona took care of his records in a proper manner, and the fact that **the bound volume contains no record of a marriage license** having been issued to Pat Murnan and Grace Daugherty **argue very strongly that no such license**

**was ever issued.** Considering the very full and complete testimony of Miss Mary P. Lewis, clerk of courts at Flagstaff, Arizona, as presented in her deposition, we necessarily arrive at either one or the other of the following conclusions:

"First no marriage license was ever issued to Pat Murnan and Grace Daugherty; **or** second the county clerk failed to make a record of the issuance of such a license. **This failure might be wilful or accidental.**" (Emphasis ours.)

Without any evidence to the contrary, there was no other alternative for the court under a controlling "sense of duty," to find that "no such license was ever issued." In order to bypass the express provisions of the law of the state of Arizona and to deny your petitioners the full faith and credit of that public act and of the records of the state of Arizona, **that judge resorts to speculation, surmise and guess as to what might have happened,** as disclosed by his own words. He presumes without any evidence that the essential requirements of the statute were complied with, that both the public officials and the parties violated the statute. What a field for fraud. If this Honorable Court denies a writ of certiorari to your petitioners, **this case will be cited throughout the land,** every time it is required to prove by the records of some state the existence of a paper or contract claimed to have been issued by some public officer in support of the claim that he **may** have, or **might** have, or **could** have failed to properly record the same. Thereby, by speculation and guess make the full faith and credit clause of the constitution of the United States a dead letter. **Therefore this case becomes one of vast, far-reaching public importance. There is not one word of testimony** in this

entire record **that any officer failed to do his duty,** As a matter of fact, the **"very full and complete testimony of M. P. Lewis, clerk of courts of Flagstaff, Arizona," is that the "marriage records of Flagstaff, Arizona are complete."**

Where there is no evidence to the contrary this court has said:

> "* * * and as the presumption always is, in the absence to the contrary, that a public officer while acting in his official capacity is performing his duty, * * *".
>
> **Town of Weyanwega v. Ayling,** 99 U. S., 112, 119.

Therefore when the marriage records are complete and show no license to have been issued or marriage performed, it is presumed in law, the officer did his duty.

In another case this Honorable Court has said:

> "When the evidence and the conclusions which a jury might fairly draw from the evidence are taken most strongly against the petitioner, the contention of respondent that the bent pipe caused or contributed to cause the death is without any substantial support. The record leaves the matter in the realm of speculation and conjecture. This is not enough."
>
> **Chicago M. & St. P. Ry. Co. v. Coogan,** 271 U. S. 472, 478.

Paraphrasing the above: When the evidence, the findings of fact and conclusions, which a court might fairly draw from the evidence, **are taken most strongly against your petitioners,** the contention of respondents that a marriage license was issued and a marriage performed in Flagstaff, Arizona, in July, 1915, is without any substantial support (Judge Barnes guessed as to what **might**

have happened) and leaves the matter in the realm of speculation and conjecture. **This is not enough.**

As a matter of fact, Judge Geiger did not concur in the findings of fact as to the issuance of a license, or a marriage in Flagstaff, Arizona, but finds that a common law marriage existed after 1919, **established merely by cohabitation and reputation,** (his words). Arizona prohibited common law marriages. Judge Barnes in his opinion said that "**the marriage of Pat and Grace must be based on a ceremonial marriage or not at all.**" **The two judges never agreed as to the essential facts,** and we respectfully call the court's attention to the judgment entry which states that "**at the time of the death of M. P. Murnan,** said parties were husband and wife." **That is merely a conclusion** and **clearly not a finding of the material facts essential to a valid statutory marriage contract.** Even Judge Geiger did not and could not find from the evidence that a contract is praesenti, as made essential by the laws of the state of Ohio for a common law marriage, was ever entered into between Grace Backenstoe and M. P. Murnan.

The Supreme Court of the state of Ohio has definitely ruled that in order to establish a common law marriage there must be proof of a contract in praesenti and has said:

> "There is complete failure of proof of an agreement in praesenti to enter into the relationship of husband and wife. The petitioner, therefore, failed to establish a relationship as common law husband of the deceased. So long as common law marriage has any recognition, **the requirements as to proof** must be **rigidly applied and enforced.**" (Emphasis ours.)
> **In Re: Redman,** 135 O. S., 584.

Grace Backenstoe claimed only one marriage and that was at Flagstaff, Arizona. There was no evidence, no proof of any kind of a marriage and no finding of fact by the court of any contract of marriage as provided by the laws of Arizona.

This Honorable Court has held that:

> "A statute is a Public Act within the meaning of Article IV, Section I of the Federal Constitution which declares that full faith and credit must be given in each state to the public acts of every other state."
>
> **John Hancock Mutual Life Ins. Co. v. Yates**, 299 U. S., 178.

When one judge, and one judge only, out of three, (a majority being required), finds that the public acts of the state of Arizona may be, or might have been, complied with, and it is seasonably and specifically asserted that their rights under the Federal Constitution are being and have been denied, by your petitioners in a petition filed as of right in the Supreme Court of Ohio. Your Honorable Court has decided that:

> "(2, 3) The right asserted by petitioner to have the New York judgment enforced in the courts of Ohio is one arising under the Constitution and a statute of the United States, and since the existence of the federal rights turns upon the legal effect of the proceedings in New York and the validity of the judgment there, the rulings on those points by the Ohio court are reviewable here. Adams v. Saenger, 303 U. S., 59, 64, 58 S. Ct., 454, 457, 82 L. Ed., 649. While they involve questions of local laws, and are of a character such that this court ordinarily re-examines them with deference after they have been passed upon by a state court, its determination cannot be accepted here as decisive of the constitutional command is to be observed, especially as the decision

of the state court rests not on the law of its own state or matters peculiarly within its cognizance, but upon the law of another state which is as readily determinable here as in the courts of Ohio."

**Titus v. Wallick**, 306 U. S., 282, 59 S. Ct., 557, 558, 59 S. R., 561.

And in a more recent case has said:

"Article IV, Section 1 of the Constitution directs that 'full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state' but also provides that 'Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof'.

"This court, of course, is the final arbitrator when the question is raised as to what is a permissible limitation on the full faith and credit clause. Alaska Packers Association v. Industrial Accident Commission, supra (294 U. S., 547, 79 Law Ed., 1052, 55 St. Ct., 518); Milwaukee County v. M. E. White County, supra (296 U. S., 274, 80 Law Ed., 226, 56 S. Ct., 229).

**Williams v. North Carolina**, .. U. S., .., 87 Law Ed., 189, 192.

Not only is there no evidence, in the record, but the Court of Appeals **as such did not find** from any evidence that a marriage license was ever issued by the clerk of court of Flagstaff, Arizona. **Unless there is such a finding of this and other essential facts, by a competent court, having jurisdiction of the subject matter of the action, sustained by the evidence, the full faith and credit clause of the Constitution of the United States has been evaded in this proceedings and has resulted in the taking of your petitioner's property without due process of law and this Honorable Court should grant a writ of certiorari so as to**

**review this case.** The action, on the record, is an arbitrary exercise of the powers of government—a denial of the equal application of the laws.

## DUE PROCESS OF LAW.

In order that there may be no mistake or misapprehension as to the fundamental constitutional questions raised, asserted, involved and decided in the state courts, we herewith present our summary of the nature of the case.

### NATURE OF THE CASE.

This case presented an issue **in ejectment** between your petitioners and Grace Backenstoe and her heirs, the respondents, **raised by the pleadings and heard and determined by the trial court.** This issue is forcefully and distinctly stated by counsel for the respondents herein, in their printed brief filed in the Ohio Supreme Court:

> "The logic of the situation will be much more quickly appreciated if we constantly bear in mind that this was primarily a suit seeking to have the title of the real estate determined and **IF** (but only if) the title is found to be in the plaintiff (and those defendants associated in interest with him), then, and then only to have it partitioned among those found to be entitled to it.
>
> "The problem is essentially the same as if the plaintiff had filed a suit asking for a declaratory judgment, and asking to have himself declared the owner of the property in question, without praying for partition at all."

As against Grace Backenstoe, the petitioners stated a cause of action, **at law, in ejectment,** under the statute, Section 11903, General Code of Ohio, for the recovery of

specific real property, alleging that they, as tenants in common, held the legal title thereto and that she, Grace Backenstoe, was in possession and asked that her possession be declared void.

The law of Ohio provides that Court of Appeals may try de novo cases in chancery only which are entitled "appeals on law and fact"; but Courts of Appeals are strictly limited in law cases to appeals only on questions of law, as in error proceedings. When a case is triable by a jury, in Ohio, it is a law case and subject to appeal on questions of law, as in error proceedings only.

Section 11903 of the General Code of Ohio provides as follows:

> "In an action for the recovery of real property, it shall be sufficient if the plaintiff states in his petition that he has a legal estate therein and is entitled to the possession thereof, describing it with such certainty as to identify the property, and that the defendant unlawfully keeps him out of the possession * * *."

This cause of action as against Grace Backenstoe, was joined with a cause of action for partition among your petitioners herein, as provided by Section 11306 General Code of Ohio.

**Section 11306** of the General Code of Ohio provides, among other things, as follows:

> "The plaintiff may unite several causes of action in the same petition whether they are legal or equitable or both when they are included in any of the following classes: * * *
>
> "7. Claims to recover real property with or without damages for withholding it, its rents and profits, and the partition thereof * * *."

**The only controversial issue heard and determined by the trial court, at law, was the legal title, ownership and the right of possession to the real estate, the subject matter of this action, an action for the recovery of specific real property.**

Therefore this was a case at law and triable to a jury and therefore not appealable on questions of "law and fact" such as would give the court the right to hear it de novo.

Section 11379 of the Ohio General Code provides as follows:

> "Issues of law must be tried by the court, unless referred as hereinafter provided. Issues of fact arising in actions for the recovery of money only, or specific real or personal property, **shall be tried by a jury,** unless a jury trial be waived, or a reference be ordered as hereinafter provided." (Emphasis ours.)

The trial court, a jury having been waived, made a specific finding of fact at the request of the heirs of Grace Backenstoe and entered judgment against the heirs of Grace Backenstoe as to the legal title and possession of the specific real property sought to be recovered, in favor of your petitioners. He found specifically and concluded in law, that Grace Backenstoe was not the surviving spouse of M. P. Murnan and was unlawfully withholding possession of the specific real property described in the petition, from your petitioners.

Article 4, Section 6, of the Ohio Constitution as amended in the year 1912, insofar as it is applicable to the question herein presented, creating, defining and limiting the jurisdiction of the Court of Appeals, is as follows:

> "The courts of appeals shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and **appellate jurisdiction in the trial of chancery cases,** and, to review, affirm, modify, or reverse the judgments of the courts of common pleas, superior courts and other courts of record within the district as may be provided by law, and **judgments** of the courts of appeals **shall be final in all cases, except cases involving questions arising under the Constitution of the United States or of this state,** cases of felony, cases of which it has original jurisdiction, and cases of public or great general interest in which the Supreme Court may direct any court of appeals to certify its record to that court * * *." (Emphasis ours.)

Article 4, Section 2, of the Ohio Constitution, as amended in the year 1912, insofar as it is applicable to the Ohio Supreme Court and to the questions herein presented, is as follows:

> "It shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and **appellate jurisdiction** in all cases involving questions arising **under the Constitution of the United States or of this state,** in cases of felony on leave first obtained, and in cases which originated in the courts of appeals, * * *" (Emphasis ours.)

Under the pleadings and the state of the record, as herein related, the rights of the parties became fixed. Due process of law, to maintain and protect those rights as guaranteed by the 14th Amendment, has been established in Ohio by Constitution, by statute and by judicial decisions of its highest courts, construing the same. It is the fixed and established law of Ohio by an unbroken line of decisions, which has become what may be called a rule of property, that:

**In Raymond v. Railway Company, et al.**, 57 O. S., 271, 272:

"3. Whether a case is one in equity or at law, does not depend upon the understanding of counsel, or of the trial court, nor upon the form of the judgment rendered, but upon the nature of the action as shown by the pleadings.

"4. A petition against a railroad company by one out of possession of real estate, which alleges title and right of possession of the land in plaintiff, and charges a wrongful entry and possession by defendant, and prays that the defendant may show his interest herein, that it may be adjudged null and void, and that judgment for the possession of the property may be awarded plaintiff, and defendant enjoined from interfering therewith until compensation is made, states a case for the recovery of specific real property, notwithstanding the petition also contained allegations of threatened irreparable damage, as a ground for relief by perpetual injunction, and of a dispute as to boundary lines, as a ground for action by the court in settlement of such dispute, and of a dispute as to title, as a ground for asking that plaintiff's title be quieted. **Such action**, being one in which either party may demand a jury, **is not appealable.**

"5. The nature of such action is not changed by an answer which pleads an estoppel merely as an equitable defense.

"6. Allegations of new matter of an equitable nature in the reply, do not change the nature of the action itself."

The court, in its opinion at page 287 in the above case analyzing the pleadings, says:

"Thus we have a case of a plaintiff out of possession making claim to the title and possession of land, and praying a court to adjudge his title good and award him possession; in other words, praying to re-

> cover the land. **All other relief sought is ancillary to this**; it is relief which, if a proper case is made by the evidence, may follow, but cannot precede, judgment of possession. That is, the case made in the pleading is for possession of land, and then equitable relief to prevent the company interfering with that possession until compensation shall be made. **The real and primary question was one of title. That settled in favor of the plaintiff, all other claims would follow and be determined as matters of relief in aid of the recovery, while, if settled against the plaintiff, his whole contention would fail** * * *."

The pleadings in the case at bar, as determining the issues between petitioners and respondents, are similar to those of **Raymond v. Railway Co.** In both cases the plaintiff was out of possession and claimed the legal title; defendant was in possession and claimed the legal title, the prayer in each case was that the interest and possession of the defendant be declared void.

A case similar with the case at bar was decided by the Circuit Court of Licking county.

**Hardway, et al., v. Consumers' Brewing Co., et al.,** 15 C. C. (N. S.), 349. **Affirmed 87 O. S., 485.**

> "Where the ownership of one of the aliquot parts of land held in severalty is in dispute, an action in partition can not be maintained by the party claiming said interest until his title thereto has been determined."

The court, page 351, supra, in sustaining the motion to dismiss the appeal said:

> "A motion is filed to dismiss the appeal on the ground that, on the issue joined, the case is not appealable.
>
> "By the provision of Section 3226 of the Revised Statutes of Ohio, 'an appeal may be taken to the

Circuit Court by a party or other person directly affected, from a judgment or final order in a civil action rendered by the Common Pleas Court, and of which it had original jurisdiction, if the right to demand a jury therein did not exist.'

"It is further provided by Section 5130 of the Revised Statutes that 'issues of fact arising in actions for the recovery of money only, or specific real or personal property, shall be tried by a jury, unless a jury shall be waived or a reference be ordered as hereinafter provided.'

"So that the question presented for determination by this motion is whether or not the issue presented by the petition herein is one in which either of the parties has the right to demand a trial by jury. If the case is held to be one for the recovery of specific real estate, then such right exists. If it is a case for partition, under the statutes of Ohio, then the right to demand a jury does not exist, and the motion should be overruled.

"Upon an examination of the issues tendered by the petition, we think that the right of partition does not exist until it is first determined whether or not the plaintiffs have title to the real estate claimed by them as against the defendant, the Consumers' Brewing Company; that this is the primary object sought in this action; and that the partition is only incidental to the recovery of title by these plaintiffs."

The **Ohio Supreme Court has followed** with approval the rule enunciated **in the case of Raymond v. Railway Company**, supra, in **Wall v. Federation Co.**, 121 O. S., 334, 337.

"Section 11379, General Code, recites in part: Issues of fact arising in actions for the recovery of money only, or specific real or personal property, shall be tried by a jury unless a jury trial be waived." See **Gunnsaullus, Admr., v. Pettit, Admr.,**

46 Ohio St., 27, 17 N. E., 231; Willson Improvement Co. v. Malone, 78 Ohio St., 232, 85 N. E., 51.

"Whether a suit is one in chancery or an action at law is to be determined from the pleadings and from the nature and character of the relief sought. **Raymond v. T. St. L. & C. Rd. Co.**, 57 Ohio St., 271, 48 N. E., 1093; Maginnis v. Schwab, 24 Ohio St., 336."

This Honorable Court has had occasion to pass upon the difference between an action at law and an action in chancery and has said that:

"So far as general principles go, we certainly should not reverse the decision of the Court of Appeals that the petitioners ought to establish their title at law before partition should be decreed. Wilkin v. Wilkin, 1 John, Ch. 111; Giffard v. Williams, L. R. 5, Ch. 546. 'A bill for partition cannot be made the means of trying a disputed title.' Bolton v. Bolton, L. R. 7 Eq. 298 note, 300; Potter v. Waller, 2 De., G. & S. 410, 417."

**Clark v. Roller,** 199 U. S., 541.

**Jurisdiction of Ohio Court of Appeals.**

Therefore, when the Court of Appeals over objection of your petitioners did assume jurisdiction to try this action at law, as a chancery case, de novo, its judgment resulted in denying your petitioners due process of law and the equal protection of laws contrary to the Fourteenth Amendment to the United States Constitution. This question having been presented to the Court of Appeals, and being a question of substance, it became a question arising under both the Ohio Constitution and the Constitution of the United States.

As a matter of fact **counsel for respondents in their**

printed brief in the Supreme Court of Ohio, recognize that the question of jurisdiction was raised at the threshold of the case in the Court of Appeals—and that the Court of Appeals recognized the contention when they stated:

> "While it was pending before the Court of Appeals, the plaintiff (and those defendants who were associated in interest with him) moved to dismiss the appeal on various grounds; but the motions to dismiss were all denied, the Court of Appeals **holding that it had jurisdiction of the appeal**—and **the case was ordered to be heard upon its merits.**"

It may be contended that the motion to dismiss the appeal on law and fact, filed by your petitioners, supra, was not sufficient to question the jurisdiction of the court and save the question.

However, the Supreme Court of Ohio with almost an identical situation presented to it, effectually disposed of that contention in the case of **State ex rel. Farber Rec. v. Jones**, 95 O. S., 357, 363, 2nd Syl.;

> "2. The appealability of a cause can be challenged at any time in the Court of Appeals before the rendition of judgment."

And in the opinion at page 363:

> "It is held in the Prestein Case (93 O. S., 423) that the rule announced in **Drake v. Tucker** did not apply where the motion to dismiss the appeal was interposed before judgment, and for the same **reason it does not apply here. The relator is, therefore, not precluded from challenging the appealability of the order under consideration and in this proceeding the jurisdiction of the Court of Appeals.**
>
> "In his motion to dismiss the appeal filed in the Court of Appeals the relator called attention to the fact that the order from which the appeal was taken

was made on October 15, 1912, and that no appeal bond was filed within thirty days as required by law. He insisted that the Court of Appeals, therefore, was without jurisdiction to hear the cause. **There was no suggestion, however, that the case was not one in chancery and for that** reason could not be appealed. Section 6, Article IV, of the Constitution as amended Sept. 3, 1912. However, this question presents itself and will be considered presently."

Your petitioners, continuing to believe that the Court of Appeals was without jurisdiction, again questioned such jurisdiction and more specifically so and before judgment. The Supreme Court of Ohio has declared that such objection, is in time and requires the court to determine the question.

In **State ex rel. Lander v. Prestlien et al.**, 93 O. S., 423, it was held that:

"2. It is not error for a Court of Appeals to sustain a motion to dismiss an appeal for want of jurisdiction, filed after the cause has been submitted to the court upon its merits."

At page 427 of the opinion the court said:

"The motion to dismiss in this case was interposed before judgment. The mere fact that the cause had been submitted upon its merits did not prevent that court from entertaining that motion, or, for that matter, dismissing the case **sua sponte**, if upon consideration it reached the conclusion that it had no jurisdiction on appeal."

The case of **Ireland v. Chenney**, 129 O. S., 527, involved a petition in error, **filed as of right** under the Ohio Constitution, the Court of Appeals had overruled a motion to dismiss the appeal, because a debatable constitutional

question was involved and in the trial of the cause on its merits held:

> "The sole question presented to this court is whether the Court of Appeals erred in overruling the motion to dismiss the appeal on the ground that the cause was not appealable.
>
> "1. The jurisdiction of the Court of Appeals is fixed by Article IV, Section 6, of the Constitution of Ohio, and cannot be changed by statute. Cincinnati Polyclinic v. Balch, 92 Ohio St., 415, 111 N. E., 159. By the terms of this constitutional provision the jurisdiction of that court on appeal from the court of common pleas is expressly limited to 'trial of chancery cases.' Wagner v. Armstrong, 93 Ohio St., 443, 113 N. E., 397, 398. This rule has been consistently followed in subsequent cases. It is also established in this state that the fundamental basis for determining appealability is found in the issues made by pleadings and the relief prayed for therein. Hummer v. Parsons, 111 Ohio St., 595, 146 N. E., 62; Wall v. Dayton Federation Co., 121 Ohio St., 334, 168 N. E., 847; J. P. Loomis Coal & Supply Co. v. Garchey, 123 Ohio St., 316, 175 N. E., 456. It is therefore necessary to look to the pleadings and if it appears therefrom that the case is one in chancery it is appealable, otherwise not."

The case of **Waters v. Corlett,** 123 O. S., 632, was heard by the Supreme Court of Ohio upon a motion to dismiss a petition filed as of right. The procedure in this case in the Court of Appeals is on all fours with the case at bar. A judgment was rendered in the Common Pleas Court in favor of Mrs. Walters, the case was appealed as a chancery case, the court overruled a motion to dismiss and tried the case de novo and the Supreme Court of Ohio in overruling the motion to dismiss the appeal as of right said:

> "It is a well settled general proposition that it must be determined from the pleadings, and the issues made by the pleadings whether a proceeding is an action in chancery or a suit at law. This proposition has been so often declared that citation of authority is unnecessary.
>
> * * * * * * * * * * *
>
> "The motion to dismiss the petition in error in this case on the ground that no debatable constitutional question was involved must be overruled, because the questions involved in this error proceeding, and the question whether or not the plaintiff in error had a right to file his petition as of right, **do clearly arise under the Constitution.** It must also be held to be a debatable constitutional question because the particular principles involved in this case have never before been determined by this court. The case is properly before the court." (Emphasis ours.)

We respectfully submit that our contention that the Court of Appeals was without jurisdiction is not predicated upon a mere technical violation of petitioners' rights, but goes to their fundamental rights. Under Ohio law an unanimous verdict is required before the Court of Appeals can reverse the lower court upon the weight of the evidence; in the case at bar the Court of Appeals was not only divided; the majority opinion was itself divided. Upon error proceedings, the judgment must have sustained the lower court.

**Duty of the Court of Appeals to Make Finding of Fact.**

Looking to the question as to whether petitioners received due process of law and the equal protection of the law as well as to whether the refusal of the Ohio Court of Appeals to answer material interrogatories rendered it

impossible for petitioners to obtain a judgment which would give full faith and credit to the public acts and records of the state of Arizona, as required by Article 4, Section 1, of the Constitution of the United States.

Section 12223-30 of the General Code of Ohio provides:

> "On application of a party objecting to a ruling or decision of the Court of Appeals during the trial, or on motion for a new trial, such court shall find from the evidence and state on the record the facts upon which the alleged error arises, or which may be material in determining whether or not error has intervened."

Section 11421-2 of the General Code of Ohio, formerly Section 11470, reads as follows:

> "When questions of fact are tried by the court, its findings may be general for the plaintiff or defendant, unless, with a view of excepting to the court's decision upon questions of law involved in the trial, one of the parties so requests, in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law."

Although they read a little different, the purpose of both sections is to permit a reviewing court to ascertain the facts upon which the trial court reached its conclusions of law.

The Ohio Supreme Court has held that:

> "The provisions of Section 11470, General Code, **confer a substantial right and are mandatory**, and where questions of fact are tried by the court without the intervention of a jury, and one of the parties with a view to excepting to the court's decision upon questions of law involved in the trial requests a separate written statement of the conclusions of fact, and as an aid to the court, submits special written interrogatories for such purpose, it is the duty of

> the court to make answer to all interrogatories involving the ultimate facts of the controversy, and to all involving probative facts from which the ultimate facts can be inferred as a matter of law, and its failure to do so is reversible error." (Emphasis ours.)
> **Produce Co. v. Dennert,** 104 O. S., 149.

Likewise, in the case at bar, a complete finding of fact or a complete answer to the interrogatories would have established the essential facts determinative of the controversy. The refusal of the majority of the Court of Appeals to answer the interrogatories or make a complete finding of fact sustains our contention that there is no evidence in the record to sustain the judgment of Barnes, J., and Geiger, C. J., and that **the finding of fact, conclusion of law and judgment of Hornberk, J.,** that:

> "An analysis of the essentials of proof will not, in my judgment, permit of the determination that they were married in any form recognized in the law"

**is correct.**

In the Produce Company case, supra, the court in its opinion says:

> "It is not necessary to set out at length in this opinion the interrogatories, fifteen in number, but it is sufficient to state generally that they entered into such detail that the answers would have disposed of all of the important facts necessary to be determined in reaching a decision of the controversy. No explanation is offered or reason assigned for the trial judge not having answered the interrogatories, thereby furnishing the special findings of fact desired by counsel for the defendant in the trial court. Section 11470, General Code, was designed to serve a useful purpose and without regard to the wisdom of its provisions we are called upon in this case to determine whether its provisions give to parties a

substantial right, or whether on the other hand its provisions may be ignored with impunity."

**Produce Co. v. Dennert**, 104 O. S., 149, 152.

**Neither the judges of the Court of Appeals, nor a master, had any opportunity to see the demeanor of the witnesses on the witness stand, or to pass upon objections to incompetent evidence.**

As late as December, 1940, the Ohio Supreme Court has had occasion to follow with approval the Produce Co. case, supra, when it said:

"It is, therefore, our holding that when a timely request is made for conclusions of fact and law in respect for motions for judgment or to direct a verdict by both parties, where no reservation of right to go to the jury thereafter is made, it is the duty of the court to make such conclusions, and the refusal to do so is prejudicial error.

"The third question above propounded may be answered in the language of the opinion at page 155 of 104 Ohio St., at page 532, 135 N. E., of Cleveland Produce Co. v. Dennert, supra, as follows: 'We are of the opinion, however, that Section 11470, General Code (now Section 11421-2 General Code), does confer a substantial right, and that a denial of that right constitutes such error as should cause this court to reverse the judgment, unless it can be determined by this court without weighing the evidence that plaintiff in error has not been prejudiced. Any other view of this section would render its provisions a dead letter'."

**Levick v. Vonnell**, 137 O. S., 453; 30 N. E. (2), 808, 810-11.

We respectfully submit, therefore, that Section 12223-30 of the General Code of Ohio **is mandatory upon the Court of Appeals** and that its failure and refusal to fully

answer the interrogatories and to make a complete finding of facts so that the record may state the facts upon which the alleged error arises, was a denial of a substantial right and a denial of due process of law and a failure to give full faith and credit to the laws of the state of Arizona.

**The Cleveland Divorce.**

That your petitioners have been denied the equal protection of the law and due process of law is apparent by an examination of the most recent case in Ohio upholding the doctrine, long established, that one affected by a void judgment can attack it whenever and wherever it is met which was decided by the Court of Appeals of Meigs county, Ohio, and is the law of the state of Ohio, by its highest court.

In that case one Mrs. Frankenberg filed a suit against herself, as executor of her husband's estate, in the Probate Court, alleging that she was his surviving spouse notwithstanding that the evidence showed that Mr. Frankenberg had secured a divorce from her in Franklin county, Ohio. The record in that divorce case is similar to the case at bar, i. e. no affidavit for service by publication was filed at the time the action for divorce was begun. The Court of Appeals reversed the lower court and held that the decree for divorce was void, that she was never divorced and said:

> "**This action is a collateral attack upon a divorce proceeding** instituted by the decedent, Charles Frankenberg, on September 4, 1908, in the Common Pleas Court of Franklin county, Ohio. The record discloses that executor and decedent were married in 1899; that they separated in 1908, and that dece-

dent brought action for divorce on the ground of willful absence in 1908 as above mentioned. The record further discloses that no preliminary affidavit for constructive service was filed but notwithstanding publication of notice was started September 9, 1908, and continued for six weeks.

* * * * * * * * * *

"It affirmatively appearing from the record here that no preliminary affidavit was ever filed the attempted service by publication was not authorized and the court never acquired jurisdiction of the person of the defendant in this divorce case and publication without such affidavit, is wholly void. Judge Bradbury in the Winemiller case made the following comment on page 420:

" 'Of course, a judgment that is void may be disregarded whenever and wherever it may be met.'

"The Supreme Court in the case of Paulin v. Sparrow, 91 O. S., 279, discussing a similar question, said on page 287:

" 'Where it affirmatively appears from the records of a court of general jurisdiction that the defendant has not been legally served with process, a decree purporting to determine the rights of such defendant is void.'

"The record in this case shows affirmatively that publication was made without a preliminary affidavit as required by law. A most casual reading of the record impeaches the judgment entry of the court. This judgment granting the divorce was void for lack of jurisdiction of the person of the defendant and being void the decedent died leaving the defendant in that case, the executor here, his surviving spouse."

**Frankenberg v. Frankenberg**, 70 Ohio Appellate, 495, Meigs county Court of Appeals. Motion to certify overruled, Nov. 5, 1942.

Granting due process of the law and the equal protection of the law and applying the above decision to the

Cleveland divorce of Grace Backenstoe from George Backenstoe, which was procured by the service of summons by publication without the filing of the preliminary affidavit required by law, Grace Backenstoe, at the time of the death of M. P. Murnan, was still the wife of George Backenstoe and therefore could not have married M. P. Murnan during his lifetime and was not his surviving spouse.

Another Ohio court, whose decisions are final in the state of Ohio, has held:

> "1. Statute providing method of service against non-resident defendant in divorce action is mandatory and must be strictly complied with (Section 11524, General Code).
>
> "2. Trial court held without jurisdiction of non-resident defendant in divorce action, where affidavit for constructive service was sworn to before notary public who was attorney of record for plaintiff (Sections 11524, 11529, 11532 and 11984, General Code)."
>
> **Beck v. Beck**, 45 Ohio Appellate, 507.

In paragraph 10 of the judgment entry (R., page 278), the Court of Appeals found that "service was had against the defendant, George Backenstoe, by publication, an affidavit of publication now in the files having been executed by her attorney as notary."

It follows from the law enunciated in the **Beck** and **Frankenberg cases cited**, supra, that the decree of divorce was not merely voidable but void ab initio and the refusal of the Court of Appeals to permit collateral attack was a complete denial of the judicial process to which your petitioners were entitled. If Grace Backenstoe was never able to marry M. P. Murnan because of her pre-existing marriage, this fact would have disposed of the entire case.

## RIGHT OF DUE PROCESS.

Due process of law and the equal protection of the laws are guaranteed the individual in every state by the 14th Amendment to the United States Constitution.

This means in the first instance, that these words were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.

Bank of Columbia v. Okley, 4 Wheaton, 235;
Hurtado v. Cal., 110 U. S., 516, 527;
Leeper v. Texas, 139 U. S., 462, 468.

It means also that no room is left where it affects the fundamental rights of an individual for the play of purely personal or arbitrary power; it means that equal protection shall be given to all under like circumstances, in the enjoyment of their civil and political rights; that all persons shall have like access to the courts for the protection of their persons and property, wrongs and contracts, and it means that no impediment or denial in a court of justice, shall be interposed to one except as it may apply to every other individual under like circumstances.

Yick Wo v. Hopkins, 118 U. S., 356, 369, 370;
Connolly v. Union Sewer Pipe Co., 184 U. S., 540, 558, 559.

The guarantees of this Amendment, and the prohibitions therein contained to make effective those guarantees, extends to the judiciary as well as to the legislative.

They require that in every judicial proceeding, that no

one can be deprived of his life or property or liberty without jurisdiction in the court of the subject matter and the person, and with notice and a hearing. They further require, that even though the court does have jurisdiction of the subject matter and the person, yet the court cannot transcend the power conferred by law.

**Scott v. McNeal**, 154 O. S., 34, 40;
**Harris v. Hardiman**, 14 How. (U. S.), 334, 341.

**Walker v. Sauvinet**, 92 U. S., 92, 93:

"Due process of law is met if the trial is had according to the settled course of judicial proceedings. Murray v. Hoboken, etc., 18 How. 280. * * * This process in the state is regulated by the law of state."

**Del Castillo v. McConnico**, 168 U. S., 674:

P. 693. "Due process of law must be found in the state statute and cannot be departed from without violating the Constitution of the United States. (This case referred to taxes and statute providing for same.)"

"To determine the existence of due process is the final province of this court."

**Den. Murray v. Hoboken Land Co.**, 18 How., 272, 280:

P. 280. "Due process of law generally implies and includes act or reus, judex, regular allegations, opportunity to answer and **a trial according to some settled course of proceedings** (several cases cited)." 2 Inst., 47, 50, 4 Dev. N. C., 15; 4 Hill 146. (This is not true, if it relates to a matter which is not of judicial cognizance.)

The jurisdiction of every court to render judgment and render the judgment it did render when it affects the right of property and has been challenged may be exam-

ined in every other court where it is sought to rely upon that judgment. If the judgment is rendered without jurisdiction of the subject matter, or person, the judgment is void and can always be assailed.

Scott v. McNeal, 154 U. S., 34, 40;
Rose v. Himely, 4 Cranch., 241, 266, 267;
Elliott v. Piersol, 1 Peters, 328;
Rhode Island v. Mass., 12 Peters, 657, 715;
Williamson v. Berry, 8 How. (U. S.), 495, 540, 541.

The judiciary is amenable to the guarantees of the 14th Amendment. A trial must be had according to the established mode of procedure applicable, to the class of cases to which the case under consideration belongs, and to the determination of the issues. The mere fact that the parties were brought before the court and were heard or given an opportunity to be heard, does not in and of itself establish due process.

If the court does disregard established principles of private right and distributive justice, if it ignores as against an individual established modes of procedure governing the case and issues in question, if it discriminates in its administration and application of the law governing the procedure and rights of the parties, by virtue of which the party has been deprived of his property and without compensation, then due process of law and the equal protection of the laws has been denied.

U. S. v. Cruikshank, 92 U. S., 542, 554;
Chicago, etc., v. Chicago, 116 U. S. 226, 234-237.

"Though a court possess jurisdiction of a cause, of the subject matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. All courts are more or less limited in their jurisdiction, even the highest. They are limited to particular classes of action,

civil or criminal; or to particular modes of administering relief such as legal or equitable. It must act judicially in all things and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction of the subject and of the parties, has no power to pass judgment of imprisonment in the penitentiary, upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case specific performance of a contract. If the action be for possession of real property, the court is powerless to admit in the case the probate of a will. * * * The judgments mentioned, given in the cases supposed, would not be merely erroneous, they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases.

"If the judgment of a court having jurisdiction exceeds the issue heard, it is in effect depriving defendant of benefit of his constitutional right to notice and is invalid and void."

**Windsor v. McVeigh**, 93 U. S., 274, 282, 283;
Reynolds v. Stockton, 140 U. S., 254, 265, 268;
Barnes v. Ry. Co., 122 U. S., 114.

It is the contention of the petitioners that the action of the Supreme Court of Ohio and of the Court of Appeals on the record, is so arbitrary and discriminatory under the Constitution, law and facts, and without any support in the evidence as to operate as a denial of due process of law and of the equal protection of the laws.

Nowhere in Ohio can it be shown, under a similar state of the record, when the Court of Appeals or the Supreme Court ever assumed to try a case in chancery de novo, an action which admittedly and concededly on the record is an action at law, and never was a chancery case, over

the timely objection of the parties to such want of jurisdiction. It results in arbitrarily taking the property of petitioners and without compensation, and in doing so by denying to him the protection, under the Constitution and established applicable law, accorded to others similarly situated and in like circumstances.

No court and no individual, or party has assumed to decide or maintain herein, that this is not an action at law as between petitioners and respondent heirs and devisees of Grace Backenstoe, and therefor triable only on error. No court in Ohio has ever assumed to decide or declare and no one has sought to maintain that this case on the record was and is a case in chancery, triable de novo in the Court of Appeals.

No decision was rendered herein, attempting to change or modify the fixed and established law in Ohio under the Constitution, applicable to the record and controlling the rights of the parties, which has in effect become a rule of property, that the Court of Appeals had jurisdiction only to try on appeal, de novo, those cases which are and were only chancery cases.

The courts of Ohio arbitrarily refused to meet that question, arbitrarily proceeded to hear and determine the cause as a case in chancery and in doing so refused to make any finding of the essential facts, essential to any judgment on the record.

Petitioners contend this arbitrary action, this unequal treatment under the law, is a violation of the 14th Amendment to the United States Constitution.

The right of appeal and more especially the right of appeal to try a case de novo, in chancery, is not a common law right. It is now and has always been a statutory,

or constitutional right. Therefore, in that sense, as with the United States courts, which acquire their jurisdiction by and through the Constitution, solely, Courts of Appeals in Ohio are courts of limited and special jurisdiction—they do not have general jurisdiction on appeal.

Therefore, since such grant of jurisdiction is not after the course of common law, there is no presumption in favor of jurisdiction. The specific requirements of the statute or Constitution as to jurisdiction must appear affirmatively in the record. This proposition has been definitely established in the jurisprudence of both Ohio and the United States.

See:

Galpin v. Page, 18 Wall (U. S.), 350, 370-373;
Old Wayne Mut. L. Assurance Co. v. McDonough, 204 U. S., 8, 15, 17.

"It is argued that the Circuit Court of the United States had no authority to question the jurisdiction of the county court of Woodford county; that its proceedings were conclusive upon the matter, whether erroneous or not.

"We agree that if the county court had jurisdiction, its decision would be conclusive. But we cannot yield an assent to the proposition that the jurisdiction of the county court could not be questioned; when its proceedings were brought before it collaterally, before the circuit court. We know of nothing in the organization of the circuit courts of the Union which can contradistinguish."

"Where a court has jurisdiction it has a right to decide every question which occurs in the cause; whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. **But, if it act without authority,** its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought, even prior to a reversal in

opposition to them. They constitute no justification, and all persons concerned in executing such judgments or sentences are considered in law as trespassers.

"The distinction runs through all the cases on the subject, and it proves that the jurisdiction of any court exercising any authority over a subject, may be inquired into in every court when the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings."

Elliott v. Piersol, 1 Peters, 328, 340. This case was followed in 12 Oh., 253, 269, Adams v. Jeffries.

Lessee of Hiceky v. stewart, 3 How. (U. S.), 750, 762.

In the case of Rose v. Himely (4 Cranch., 241, p. 269), Chief Justice Marshall said:

"A sentence professing on its face to be the sentence of a judicial tribunal, if rendered by a self-constituted body, or by a body not empowered by its government to take cognizance of the subject it had decided, could have no legal effect whatever. **The power of a court then is, of necessity, examinable to a certain extent by that tribunal, which is compelled to decide whether its sentence has changed the right of property.**

"**The power under which it acts must be looked into,** and its authority to decide questions which it professes to decide, must be considered." * * * Upon principle, it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or in other words, on its jurisdiction over the subject matter which it has determined.

(P. 269, 4 Cranch.) "In some cases, that jurisdiction unquestionably depends as well on the state of the thing, as on the constitution of the court.

P. 762. "The same doctrine was maintained in Wilcox v. Jackson, (13 Peters 511)."

Galpin v. Page, 18 Wall., 350, p. 371:

"However high the authority to whom a special statutory power is delegated," says Mr. Justice Cooleridge of the Queens Bench, "we must take care that in the exercise of it the facts giving jurisdiction plainly appear, that the terms of the statute are complied with. The rule applies equally to an order of the Lord Chancellor, as to any order of Petty Sessions. * * *

"A court of general jurisdiction may have special and summary powers, wholly derived from statute, not exercised according to the course of common law, which do not belong to it as a court of general jurisdiction. In such cases its decisions must be regarded and treated like those of courts of limited and special jurisdiction. The jurisdiction in such cases both as to the subject matter of the judgment and as to the persons to be affected by it must appear by the record, and everything will be presumed to be without the jurisdiction which does not distinctly appear to be within it. Morse v. Presly, 5 Fost, 302.

"The qualification here made, that the special powers conferred are not exercised according to the course of the common law, is important. * * * Where general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record.

"The extent of the special jurisdiction and the conditions of its exercise over subjects or persons necessarily depend upon the terms in which the jurisdiction is granted, and not upon the rank of the court upon which it is conferred.

"Such jurisdiction is not, therefore, the less to be strictly pursued because the same court may possess over other subjects, or other persons a more extended and general jurisdiction. (To the same effect as Adams v. Jeffries, 12 Oh. 272.)

"Here, the court said, where jurisdiction is to be acquired by publication by following the statute, if the state court did not follow it, it could not be expected that the United States Supreme Court would not follow it in any case presented to it."

Yick Wo v. Hopkins, 118 U. S., 369, 370, said in addition to what it quoted above:

"Law is definition and limitation of power.

"The fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that in the language of the Massachusetts bill of right, the government of the commonwealth 'may be a government of laws and not of men'.

"For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Truax v. Corrigan, 257 U. S., 254 involved a statute of Arizona. On page 332, the court said:

"This brings us to consider the effect in this case of that provision of the 14th Amendment which forbids any state to deny any person the equal protection of the laws. The clause is associated in the amendment with the due process clause, and it is customary to consider them together.

* * * "The due process clause says the court cannot proceed arbitrarily or capriciously. * * *"

**"Our whole system of law is predicated on the general fundamental principle of equality in the application of the law."**

**P. 333. "Protection is not protection unless it does protect."**

"When the record discloses a want of jurisdiction, the judgment is, of course, void everywhere and for every purpose * * *."

"Every judgment depends for its force and validity, on the competency and authority of the tribunal which pronounces it, and may be assailed by showing a want or failure of jurisdiction, over the subject matter or the person, even though absolutely conclusive in other particulars."

Spier v. Corll, 33 O. S., 236, 244;
Pennywit v. Foote, 27 O. S., 600, 615, 618;
Kingsborough v. Tousley, 56 O. S., 450, 455-460;

These cases follow Thomas v. Whiteman, 18 Wall, 457, Pennoyer v. Neff, 95 O. S., 714.

On the other hand, the Constitution of Ohio, Section 6, Article IV, provides that the Court of Appeals shall have appellate jurisdiction **only in chancery cases. If the case at bar is not a chancery case** and is an action at law for the recovery of specific real property, any judgment on the record entered by the Court of Appeals is without jurisdiction, void and of no effect.

We, therefore, respectfully submit that this case being an action at law for the recovery of specific real property, the Court of Appeals was without jurisdiction to try or determine this; that to do so on the record was an arbitrary exercise of the powers of government and a denial of the equal application of the laws; that full faith and credit was arbitrarily denied petitioners.

## CONCLUSION.

Summarizing, it is our contention that:

(1) All the elements giving this court jurisdiction to grant a writ of certiorari are present in this case.

(2) There is indisputably involved the question of the manifest denial by the courts of Ohio of the guarantee of full faith and credit to the public acts and records of the state of Arizona on an essential matter controlling the rights of the parties on the record.

(3) There is involved the question of the petitioners being deprived of their property, without compensation, and without due process of law and the equal application of the laws as measured by the Fourteenth Amendment.

The judgment of the Supreme Court of the state of Ohio and of the Court of Appeals should be reversed and judgment entered for the petitioners.

Respectfully submitted,

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